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SUN LIFE MALAYSIA TAKAFUL BHD v. NOORULASMIAH SULONG & ORS

HIGH COURT MALAYA, JOHOR BAHRU
GUNALAN MUNIANDY JC
[ORIGINATING SUMMONS NO: 24NCVC-240-04-2014]
B 8 JANUARY 2015

INSURANCE: *Motor insurance – Policy – Breach of condition in policy by insured – Declaration that policy of insurance invalid and unenforceable – Whether insured entered into vehicle hire agreement with third party – Whether* C *custody of motorcar handed over to third party without knowledge of insurer – Whether contravened express terms of certificate of insurance – Whether motorcar met with accident – Whether passengers in motorcar could claim for damages – Whether insurer liable – Road Transport Act 1987, s. 96(1) & 96(3)*

D ***CONTRACT:*** *Breach – Terms – Motor insurance – Breach of condition in policy by insured – Declaration that policy of insurance invalid and unenforceable – Whether insured entered into vehicle hire agreement with third party – Whether custody of motorcar handed over to third party without knowledge of insurer – Whether contravened express terms of certificate of insurance – Whether motorcar* E *met with accident – Whether passengers in motorcar could claim for damages – Whether passengers privy to contract – Whether passengers entitled to oppose insurer's application – Road Transport Act 1987, s. 96(1) & 96(3)*

CIVIL PROCEDURE: *Affidavits – Swearing of – Deponent swore affidavit on behalf of registered company – Affidavit sworn in Johor Bahru when registered* F *office located in Kuala Lumpur – Whether affidavit invalid and defective – Whether in contravention of r. 13 Commissioners for Oaths Rules 1993*

This was the plaintiff's application *vide* encl. 1 for a declaration, among others, that the policy of insurance for the first defendant's motorcar was invalid and unenforceable due to a breach of Condition 7 of the certificate G of insurance. The facts revealed that at the request of the first defendant, as the registered owner of the said motorcar, and on payment of the required premium, the plaintiff issued an insurance policy for the period 14 September 2008 till 13 September 2009. During the currency of the policy, the first defendant entered into a vehicle hire agreement with one H Syarikat Coridor ATMC Transport Services on 20 September 2008 and handed over custody of the insured vehicle to the managing director of the company. On 21 January 2009, the motorcar met with an accident. As a result of the said accident, the second defendant to the eighth defendant ('D2-D8') being the passengers in the said motorcar had suffered losses and I damages. The plaintiff was served with a statutory notice under s. 96(2)(a) of the Road Transport Act 1987 ('the RTA') in respect of the accident. The plaintiff, however, denied all liabilities due to the fact that the vehicle had been used for hire which contravened the express terms of the certificate of

insurance. A civil action was commenced in the Magistrate Court by D2-D8 to claim for damages as a result of the accident. *Vide* this application, the plaintiff contended that (i) it was not liable for any damages, order or judgment in the civil suit commenced by D2-D8; (ii) it did not have knowledge about the agreement entered between the first defendant and a third party for hire of the vehicle when the policy was in force; and (iii) D2-D8 did not have legal capacity or *locus standi* to oppose this application as they had no privity of contract with the plaintiff in respect of the policy of insurance. D2-D8, on the other hand, raised a preliminary objection and argued that the plaintiff's affidavit-in-support of this application was invalid and defective as it was sworn in Johor Bahru whereas the plaintiff had its registered address in Kuala Lumpur. It was alleged that this contravened r. 13 of the Commissioners for Oaths Rules 1993. Further, D2-D8 opposed the plaintiff's application on the ground that they were not privy to the contract of insurance and argued that they should not be prejudiced by any declaratory order sought to be made to their detriment.

Held (allowing encl. 1):

(1) The fact that the plaintiff had its registered office in Kuala Lumpur did not bar or prevent the deponent from swearing the affidavit in Johor Bahru, where its solicitors were based. Further, there is no known law or principle requiring the deponent of an affidavit on behalf of a registered company, being an officer authorised to do so, to swear it at the place or district where the company has its registered or business address. In the circumstances, the preliminary objection was misconceived and baseless. (paras 9 & 10)

(2) From a plain reading of s. 96(1) and s. 96(3) of the RTA, the plaintiff was entitled to avoid or cancel any policy for breach of its express terms. The said policy was a contract between the insurer and the insured. As such, D2-D8, not being party or privy to the contract of insurance, were not entitled in law to oppose the insurer's action for a declaration of its rights to avoid liability or cancel the policy in the event of a breach (*Nanyang Insurance Co Ltd v. Salbiah & Anor*; dist). (paras 11, 12 & 16)

(3) The alleged breach was in letting the insured vehicle for hire to a third party. This was in breach of Item 7 of the certificate of insurance and also contrary to the general exception 3(c) of the policy. The breach occurred within the period of validity of the policy and rendered the policy as void and unenforceable against the plaintiff from the date of the breach, *ie*, on 20 September 2008. The motor vehicle accident occurred when the policy was no longer valid at the material time for coverage to be extended to the first defendant and for any judgment as the insurer no longer had any insurable interest in the said vehicle due to the infringement of Item 7. (paras 14 & 15)

(4) Strict compliance with the terms of the contract of insurance by the parties is enforceable in principle. An insurance policy is essentially a contract of personal indemnity and the insurers cannot in law be compelled to accept liability in respect of a third party who may be quite unknown to them. Under s. 96(3) of the RTA, the insurer was entitled to seek the declaration sought in this case. (para 16)

Case(s) referred to:
Kurnia Insurans (Malaysia) Bhd v. Personal Representative of Zenol Saad & Ors [2013] 1 LNS 239 HC ***(refd)***
Lim Geak Liang v. East West - UMI Insurance Bhd [1994] 2 CLJ 405 HC ***(refd)***
Nanyang Insurance Co Ltd v. Salbiah & Anor [1966] 1 LNS 114 FC ***(dist)***
Peters v. General Accident and Life Insurance Corp Ltd [1937] 4 All ER 628 ***(refd)***

Legislation referred to:
Commissioners for Oaths Rules 1993, rr. 2(a), 13(2)(a)
Road Transport Act 1987, s. 96(1), (2)(a), (3)
Rules of Court 2012, O. 1A, O. 2 rr. 2, 3

For the plaintiff - Hardip Singh; M/s Terang Manjit Azmi & Hardip Singh
For the 2nd to 8th defendants - HS Mann; M/s NM Tiong & Co

Reported by Kumitha Abd Majid

JUDGMENT

Gunalan Muniandy JC:

[1] This is an application *vide* originating summons ('OS') (encl. 1) for a declaration that the policy of insurance for motorcar then bearing registration number TAT 2934 for the period 14 September 2008 to 13 September 2009 is invalid and unenforceable for breach of Condition 7 of the certificate of insurance. The plaintiff insurer sought the following declaration and ancillary orders:

1. bahawa masa (jika perlu) dilanjutkan untuk memfailkan Saman Pemula ini;

2. bahawa Polisi Insurans No. TKTDMT0180006128 yang melindungi motokar No. TAT2934 (sekarang ini dikenali dengan No. JLQ6226) bagi tempoh 14.09.2008 hingga 13.09.2009 adalah tidak sah (void) dan tidak boleh dikuatkuasakan (unenforceable) setakat perlindungan terhadap satu kemalangan yang berlaku pada 21.01.2009 yang melibatkan motokar No. SJD1449T dengan motokar No. TAT2934 kerana penggunaan motokar No. TAT2934 tersebut bercanggah dengan perkara 7 kepada Sijil Insurance (item 7 of the certificate of insurance dan/atau bercanggah dengan peruntukan General Exceptions 3(a) Polisi Insuran tersebut;

3. bahawa Plaintif tidak bertanggungjawab untuk menanggung sebarang perintah atau penghakiman berikutan dengan tindakan sivil di Mahkamah Majistret Johor Bahru Saman No: A73KJ-394-

02/2014 dan/atau Plaintiff tidak bertanggungjawab untuk membayar apa-apa jumlah wang kena dibayar oleh Plaintif sebagai seorang penanggung insuran di bawah subseksyen 96 (1) Akta Pengangkutan Jalan 1987 kepada Defendan Kedua hingga Defendan Kelapan kerana polisi insuran itu tidak sah (void) dan tidak boleh dikuatkuasakan;

4. sebarang perintah atau arahan lanjutan atau arahan-arahan lain yang dianggap sesuai, adil dan manfaat oleh mahkamah yang mulia ini; dan

5. kos permohonan ini.

Grounds of Application

[2] In its affidavit in support the plaintiff raised the following grounds to support its application:

(i) At the material time, the plaintiff, known then as CIMB Aviva Takaful Bhd, was the insurer for motorcar number TAT2934 (now JLQ 6226) ('the said motor vehicle') of which the first defendant was the registered owner.

(ii) At the request of the first defendant and on payment of the required premium, the plaintiff issued the above motor vehicle insurance policy for the period 14 September 2008 till 13 September 2009.

(iii) As the insurer for the said motor vehicle the plaintiff on 16 January 2014 received a copy of the statutory notice dated 10 January 2013 under s. 96(2)(a) of the Road Transport Act 1987 ('RTA') from the solicitors acting for defendants 2-8, M/s NM Tiong & Co in respect of the motor vehicle accident between motorcar number TAT2934 and motor car number SJD1449T.

(iv) Subsequently, the plaintiff, through its solicitors, M/s Terang, Manjit, Azmi And Hardip Singh, *vide* letter dated 22 January 2014 to M/s NM Tiong & Co denied and/or rejected all liability on the ground of breach by the first defendant of Condition 7 of the certificate of insurance that did not cover the said vehicle as it was used by the first defendant (D.1) for hire without prejudice for accepting service of the writ on behalf of the driver and registered owner of the vehicle.

(v) The plaintiff as insurers for the said vehicle were served with a copy of the writ dated 6 February 2014 and the statement of claim dated 9 January 2014 by M/s NM Tiong and Co solicitors acting for defendants 2-8 (D2 - D8) in the Johor Bahru, Magistrate Court ('JBMC') civil suit.

(vi) The said motor vehicle had been used as a vehicle for hire in contravention of an express term of the certificate of insurance. As a consequence, the insurance policy was rendered void and unenforceable for coverage of liability in respect of motorcar number TAT2934. Pursuant to s. 96(1), RTA. The plaintiff was entitled to repudiate liability or cancel the policy of insurance on this ground.

(vii) The plaintiff was not liable for any damages, order or judgment in the civil suit commenced by D2 - D8 at the JBMC.

(viii) Clause 7 of the certificate of insurance states expressly that the insured would not be covered if the vehicle is used for hire whereas in this case D1 entered into an agreement dated 20 September 2008 for hire of the vehicle without the plaintiff's knowledge when the policy was in force.

(ix) D2 - D8 had no legal capacity to oppose this application as they had no privity of contract with the plaintiff in respect of policy of insurance. Instead, they were entitled to enforce the court order or judgment against the insured/registered owner (D1).

Grounds In Opposition Raised By D2-D8

[3] D2-D8 raised the following grounds in opposition:

(i) Plaintiff's affidavit in support is invalid and defective as it was by sworn in Johor Bahru whereas the defendant's address is in Kuala Lumpur. This is an important issue that goes to the case of application as it contravenes of both r. 13 reg. 2(a) of the Commissioners for Oaths Rules 1993.

(ii) Any breach of the terms of the certificate of insurance senders the policy/voidable only and not void.

(iii) Any breach by the policy holder binds only the plaintiff and defendant 1 ('D1') under the doctrine of privity of contract.

(iv) This OS is prejudicial to D2-D8 as passengers in the said motor vehicle who had suffered losses and damages.

The Law Applicable

[4] The right of an insurer to avoid or cancel a policy of insurance not withstanding that a certificate of insurance has been delivered is governed by s. 96(1) of the RTA which provides that:

> 96.(1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by

> a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy), is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

[5] As regards the right of an insurer to obtain a court declaration that the policy was void or unenforceable, s. 96(3) RTA states in clear and express terms that:

> (3) No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration form a court that the insurance was void or unenforceable.

[6] In *Kurnia Insurans (Malaysia) Bhd v. Personal Representative of Zenol Saad & Ors* [2013] 1 LNS 239, the High Court in dealing with the issue of avoidance of liability by the insurer on the ground of loss of insurable interest in the vehicle on the part of the registered owner causing the policy to lapse, referred to several authorities as follows:

> The following authorities are applicable to the present case:
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> In *Bibendum Sdn. Bhd. v. Amanah Scott Properties (KL) Sdn. Bhd.* [2011] AMCR 792, the High Court in citing *Halsbury's Laws of Malaysia*, Vol 4, Malaysian Law, Journal SB 2000 page 37, paragraph 60.034, stated:
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> > With regards to an insurable interest in property, the general principle for Malaysia would be that an insurable interest should exist at the time the event causing the loss occurs. Thus, an owner of a car who has sold it, would not be able to recover from a motor policy which has not expired if the car is damaged in the hands of the new owner.
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> In *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd* [1981]1 LNS 40; [1981] 2 MLJ 324, the Federal Court held;
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> > (1) in this case, once ownership of the truck changed the insurance policy lapsed unless there was no novation of the policy, which was not alleged. The driver of the truck was not covered by the insurance policy as there was no insurance policy at the time of the accident.
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> In *Peters v. General Accident & Life Assurance Corpn., Ltd* [1937] 4 AER 628 Goddard J, held:
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> (i) when the vendor sold the car, the insurance policy automatically lapsed.
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> (ii) at the time of the accident, the purchaser could not be said to be driving the car by the order or with the permission of the vendor, as the car was then the purchaser's own property.

(iii) the insured is not entitled to assign his policy to a third party. An insurance policy is a contract of personal indemnity, and the insurers cannot be compelled to accept responsibility in respect of a third party who may be quite unknown to them.

[7] In *Lim Geak Liang v. East West - UMI Insurance Bhd* [1994] 2 CLJ 405, KC Vohrah J (as the then was) held *inter-alia*:

> Condition 4 of the policy required the plaintiff to give notice to the defendant of any other policy issued to him during the currency of the policy and the defendant was entitled to rely on this clause to say that the plaintiff had not fulfilled his obligation to inform them of the insurance policy issued by Royal Insurance (Malaysia) Sdn. Bhd.
>
> The second opening clause in the policy issued by the defendant made condition 4 of the policy a condition precedent to the right to recover under the policy and as the plaintiff was in breach of condition 4, the defendant was entitled to repudiate liability.

Decision

[8] On the preliminary issue canvassed by D2-D8 that the plaintiff's affidavit in support was defective for contravention of the 1993 Rules the plaintiff objected to the preliminary objection being raised on technicalities at the stage of the substantive hearing of the OS on the ground, *inter alia*, that the PO was never raised during the pre-trial case management when all the affidavits had been filed and exhausted. Apart from that, in arguing that the matter should be heard on its merits as serious issues were in dispute, and not dismissed on alleged technical non-compliance the plaintiff relied on O. 1A, O. 2 rr. 2 and 3 of the Rules of Court 2012 ('ROC') which spell out that:

> **Order 1A**
> Court or Judge Shall Have Regard to Justice
> 1A. In administering these Rules, the Court or a judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these Rules.
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> **Order 2 rule 1**
> Non-compliance with Rules (O. 2 r. 1)
> 1. (1) ... non-compliance shall be treated as an irregularity and shall not nullify the proceedings ...
>
> **Order 2 rule 3**
> Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)
> 3. A Court of Judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any provision of these Rules unless the court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both.

[9] More importantly, the PO was, in my view, factually baseless and flawed as it is premised purely on the fact that the plaintiff had its registered address in Kuala Lumpur and thus, that the affidavit sworn in Johor Bahru was purportedly defective for being in breach of the 1993 Rules. Rule 13(2)(a) of the Rules states that:

> 13. Conduct and duties of Commissioner for Oaths.
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> (1) In the course of performing his duties, a Commissioner for Oaths shall pin at the top left shirt pocket an identification tag described in Form 5.
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> (2) In exercising his functions, a Commissioner for Oaths shall personally attend to any person requiring his services and shall:
>
> (a) verify the identity, the personal particulars as given in the identity card or passport, and the address of the person making the declaration, affirmation, affidavit, oath, or statement before the Commissioner;

[10] The fact that the plaintiff had its registered office in KL did not bar or prevent the deponent of the affidavit from swearing the affidavit in JB, where its solicitors were based, on 30 April 2014. There is no known law or principle requiring the deponent of an affidavit on behalf of a registered company, being an officer authorised to do so, to swear it at the place or district where the company has its registered or business address. In the circumstances, I held that the PO, raised by D2-D8 was misconceived and baseless. I, accordingly, dismissed the PO and proceeded to hear the OS on its merits and the substantive issues.

[11] Section 96(1) RTA enables any insurer to avoid or cancel an insurance policy. In other words, the policy is voidable at the instance of the insurer. The policy is a contract between the insurer and the insured only. In this case, the basis of the present application for declaration is breach of the terms of the policy by the insured.

[12] D2-D8's contention that the plaintiff had an insurable interest in the said vehicle based on the Federal Court decision of *Nanyang Insurance Co Ltd v. Salbiah & Anor* [1966] 1 LNS 114; [1967] 1 MLJ 94 and thus, that the policy of insurance cannot be rendered void is, to my mind, untenable in law. This is because that case can be clearly distinguished from the instant case on the facts. In that case, the Federal Court found on its peculiar facts that the appellants (insurer) had an insurable interest in the car on the date of the accident as the car was being driven by a third party with the permission of the insured whereas in the instant case the motorcar was let out for hire before the date of the accident without the knowledge and/or consent of the insurer. The plaintiff's contention was that this act was in contravention of a clear condition of the certificate of insurance

resulting in the plaintiff having no insurable interest in the vehicle at the material time. The decision in *Nanyang Insurance (supra)* turned on its own particular facts and had no bearing on the principal issue in the instant case.

[13] It is an undisputed fact as deposed to in the plaintiff's affidavit in support that during the currency of the present policy of insurance D1 had on 20 September 2008 entered into a vehicle hire agreement with one Syarikat Corridor ATMC. Transport Services at the rate of RM2,000 per month. D1 then, pursuant to the agreement, handed over custody of the insured vehicle to the managing director of the company. In the civil action commenced by D2-D8 at the JB the Magistrate Court, they claimed for general and special damages arising out of the said accident which occurred on 21 January 2009 in Jalan JB - Kota Tinggi involving the said vehicle (TAT2934) and another motorcar (SJD1449T). The policy was in force from 14 September 2008 - 13 September 2009.

[14] The alleged breach is in letting out the insured vehicle for hire to a third party in breach of Item 7 of the certificate of insurance and also contrary to General Exception 3(c) of the policy. The breach by the first defendant is not disputed by the second-eighth defendants (D2-D8). However, they are opposing the application on the ground that they are not privy to the contract of insurance between the contracting parties and should not be prejudiced by any declaratory order sought to be made to their detriment. On the other hand, the plaintiff's stand is that they have no capacity or *locus standi* to oppose the application on the ground of privity of contract and that, it is only the first defendant (D1) who is clothed with the legal capacity to oppose encl. (1). D1 has not opposed encl. (1), nor has he filed any affidavit in reply to contradict the facts deposed to by the plaintiff. Hence, the said facts are, in this case deemed to be admitted.

[15] It is indisputable that no privity of contract exists between D2-D8 and the plaintiff. This application is premised purely on breach of contract by D1. Hence, the issue in dispute has to be determined strictly based on the terms of the contract as embodied in the certificate of insurance, which are binding on the parties to the contract. From the facts, breach of Item 7 of the certificate of insurance by letting out the vehicle insured for hire is plain and obvious as of 20 September 2008 and was continuing. The period of validity of the current policy is 14 September 2008 - 13 September 2009. Hence, the said breach occurred within this period of validity and rendered the policy void and unenforceable against the plaintiff from the date of the breach on 20 September 2008. As the motor vehicle accident ('MVA') which is the subject matter of the civil action in the Magistrate Court occurred on 20 January 2009, the policy was no longer valid at the material time for coverage to be extended to D1 and for any judgment as the insurer no longer had any insurable interest in the said vehicle by reason of the aforesaid infringement of Item 7. Hence, liability to pay damages to the plaintiffs in that action was no longer enforceable against the insurer.

[16] From a plain reading of the clear and unambiguous provisions of s. 96(1) and s. 96(3) RTA and principles established by several authorities, the plaintiff insurer is entitled to avoid or cancel any policy for breach of its express terms. Strict compliance with the terms of the contract of insurance by the parties is enforceable in principle. An insurance policy is essentially a contract of personal indemnity, and the insurers cannot in law be compelled to accept liability in respect of a third party who may be quite unknown to them as occurred in this case when the said vehicle was let out for hire to a third party obviously unknown to the plaintiff. (See *Peters v. General Accident and Life Insurance Corp Ltd* [1937] 4 AER 628) Under s. 96 (3) the insurer is entitled to seek the declaration sought in this case in the present circumstances. D2-D8, not being party or privy to the contract of insurance are not entitled in law to oppose the insurer's action for a declaration of its right to avoid liability or cancel the policy in the event of breach as adverted to.

[17] For the foregoing reasons, principally, the court holds that plaintiff is entitled to the declaratory orders and the consequential reliefs sought in encl. (1).